Good GMC, Inc. *and* General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7-CA-19397

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 24 September 1982 Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract embodying its agreement with the Union and by demanding as a condition precedent to its acceptance of the agreement that a nonmandatory subject of bargaining be resolved. We find merit in Respondent's exceptions, for the reasons stated below.

The pertinent facts are as follows: Respondent had been operating under its predecessor's (Kroblen GMC Truck Sales, Inc.) collective-bargaining agreement with the Union. Prior to the expiration of that collective-bargaining agreement on 31 May 1981[1] Respondent and the Union met on two separate occasions to negotiate the terms of a new collective-bargaining agreement.

At the first bargaining session on 21 May Respondent was represented by its attorney, Clary, and Jacobus, its general manager and 25-percent owner. Union Business Agent Mosqueda and shop steward Guild represented the Union. It is uncontroverted that on 21 May the parties agreed upon certain "ground rules" for the negotiation sessions. Clary announced these ground rules, as follows: (1) that he and Mosqueda would be the spokespersons for Respondent and the Union, respectively; (2) that, although Guild and Jacobus would be permitted to speak at the negotiation sessions, "any talk by the steward or Mr. Jacobus was just talk"; (3) that only the spokespersons would have authority to make any tentative agreements; and (4) that any agreements reached in the course of negotiations were tentative only and subject to ratification by both the unit employees and Respondent's principals.

At the 21 May negotiation session, Mosqueda orally outlined the Union's proposed collective-bargaining agreement. Clary then expressed his intent to respond to the proposal at a later session, but emphasized Respondent's desire to resolve the "Harry Smith" matter.[2] Mosqueda informed Clary that he had no authority to settle the Smith matter because Mosqueda could be subjected to a fair representation suit for doing so, and that any settlement of that matter would have to be negotiated with Kleiner, the Union's attorney. Nevertheless, Mosqueda agreed to act as a conduit by contacting Smith, in Clary's presence, and relaying Respondent's desire to settle the matter. When Mosqueda asked Smith if he would be willing to settle his case, Smith responded that he wanted about $40,000 in settlement.

The parties met for a second negotiation session on 29 May, at which time Clary presented Respondent's written contract proposal. After Mosqueda and Guild discussed Respondent's contract proposal between themselves, they expressed to the company representatives their intent to recommend acceptance of the proposal to the unit employees, with the exception of item 3. Item 3 stated: "Satisfactory resolution of the Harry Smith dispute." Mosqueda emphasized once again that settlement of the Smith matter would have to be effectuated through the Union's attorney. Jacobus then allegedly stated, in Clary's presence and without Clary's disavowal, that there would be no contract unless the Smith matter was resolved. Clary stated that he had been unable to contact Kleiner, but that he "would try to get ahold [sic] of Mr. Kleiner again and that we would then see if we could resolve the total matter, and we would get back to the union or schedule another meeting to get the matter resolved." Following the 29 May bargaining session, Respondent's contract proposal was presented to the unit employees for ratification, and they voted to ratify the proposal with the exception of item 3. Mosqueda called Jacobus on 2 June to inform him of the ratification vote. Jacobus responded that there would be no contract unless the Smith matter

[1] All dates are in 1981 unless indicated otherwise.

[2] Harry Smith had been an employee of Respondent's predecessor, Kroblen GMC. Smith was discharged by Kroblen GMC and, after a grievance challenging his discharge was taken to arbitration, the Western Michigan Industrial Board ordered his reinstatement. Kroblen GMC reinstated Smith, but subsequently discharged him. The Western Michigan Industrial Board again ordered his reinstatement. This second order of reinstatement was rendered against Kroblen GMC prior to Respondent's acquisition of its assets in March 1981. Respondent was reluctant to reinstate Smith as ordered by the Industrial Board and requested that the matter be resolved instead by a monetary settlement with Smith.

was resolved. On the same day, Jacobus also was informed that Respondent's employees had requested the Union's decertification; a decertification petition was filed on 5 June.

The Administrative Law Judge concluded that Respondent insisted to impasse that the Union settle the Smith matter, a nonmandatory subject of bargaining, and withdraw the employee grievance before it would sign the contract. The Administrative Law Judge predicated his conclusion on the fact that Respondent persistently expressed its desire to settle the matter, even though it had been informed by the Union's negotiation representative that he had no authority to settle the matter and that Respondent would have to look to the Union's attorney to dispose of it. The Administrative Law Judge found that even though Respondent attempted to incorporate resolution of the Harry Smith dispute in its written contract proposal, the record was clear that at no time in the negotiation sessions did that issue become an integral part of the "agreement." He further found that the Union's acceptance of Respondent's proposed contract in its entirety, with the exception of item 3, reflected a meeting of the minds with respect to all subjects other than item 3. The Administrative Law Judge concluded that Respondent's refusal to sign the contract after the employees' ratification demonstrated that Respondent had made item 3, a nonmandatory subject of bargaining, a condition precedent to its acceptance of the agreement. Therefore, the Administrative Law Judge found that Respondent violated Section 8(a)(5) and (1) of the Act and ordered, *inter alia*, that Respondent sign and retroactively implement, upon the Union's request, the collective-bargaining agreement ratified by the Union on 29 May.

Contrary to the Administrative Law Judge, we cannot find that Respondent violated the Act as alleged. As noted above, in setting the ground rules for the negotiation sessions, Clary stipulated, as admitted by Mosqueda, that any tentative agreement reached was subject to the approval of Respondent's principals. It is clear that Respondent's principals never ratified the alleged agreement and, indeed, there is no evidence that all of Respondent's principals even were apprised of the employees' ratification of the alleged agreement or of the Union's request on 2 June that Respondent sign a collective-bargaining agreement. Therefore, contrary to the Administrative Law Judge, we find that the parties never had an agreed-upon contract.

Moreover, contrary to the Administrative Law Judge, we find that Respondent's reliance on *Nordstrom, Inc.*, 229 NLRB 601 (1977), and *Laredo Packing Co.*, 254 NLRB 1, 18 (1981), for the proposition that the parties never had reached agreement on the collective-bargaining proposals, was not misplaced. The issue in *Nordstrom*, like the instant case, was whether one party to collective-bargaining negotiations could effectively conclude negotiations by agreeing only to those demands of the other party which constituted mandatory subjects of bargaining. The Board in *Nordstrom* noted that it was clear that a party could not lawfully insist upon the inclusion in a collective-bargaining agreement of proposals which were nonmandatory in nature. Nevertheless, the Board noted that nonmandatory subjects of bargaining could, as a function of cost, bear upon a party's mandatory subjects of bargaining. Thus, to say that the proponent of the nonmandatory proposal could not *insist* upon the inclusion of such a proposal meant just that, and no more. Once the nonmandatory proposal was removed from the bargaining table, there was nothing to prohibit the proponent of the nonmandatory subject from altering its proposals concerning mandatory subjects in light of the removal of the nonmandatory subject.[3]

The Board in *Nordstrom* acknowledged that circumstances may exist in which a party unlawfully insists on the inclusion of a nonmandatory subject of bargaining at a time when all other matters have previously, and independent of the outstanding nonmandatory subject of bargaining, been agreed upon.[4] The consequences of such insistence are not, on the facts presented, at issue in the instant case, because it is clear that the nonmandatory subject of bargaining proposed by Respondent was part of a package proposal.

Consistent with the position advanced by the Board in *Nordstrom*, the Board in *Laredo Packing* found that no agreement had been reached on all the terms of a collective-bargaining agreement because the nonmandatory subjects of bargaining advanced by the respondent as a condition for executing a collective-bargaining agreement were part of one collective-bargaining package and were an essential *quid pro quo* for the respondent's contract proposal.[5] Likewise, in the instant case, the Union selectively accepted part of Respondent's package proposal and claimed that an agreement had been reached thereon, in disregard of the fact that Respondent had proposed item 3 as part of a complete package proposal. In these circumstances, the Union was not entitled to pick and choose those contract proposals which suited its needs and demand execution of a collective-bargaining agreement limited to those proposals. Therefore, and be-

[3] See *Nordstrom, supra* at 601.
[4] *Id.* at 602.
[5] See *Laredo Packing, supra* at 18.

cause no agreement on item 3 had been reached, here was no agreement on all terms of the proposed package collective-bargaining agreement, we conclude that there was no agreed-upon contract here and that Respondent's refusal of the Union's request to execute the proposed collective-bargaining agreement was not violative of the Act.

Additionally, we find that Respondent did not insist to impasse on the resolution of the Harry Smith matter as a condition precedent to its signing of the contract, for the reasons stated below. Thus, Clary's statement at the termination of the 29 May negotiation session that he would contact the Union's attorney about the Harry Smith matter and then "would get back to the Union or schedule another meeting to get the matter resolved" clearly demonstrates that the parties had not exhausted their bargaining efforts. In determining whether impasse has been reached, the Board examines whether further bargaining would be futile; in other words, impasse is not reached because of a mere exchange and rejection of proposals.[6] In the instant case, it is clear that both parties anticipated about a week's hiatus of bargaining after the 29 May session, during which time Clary was to approach Kleiner about negotiating a settlement of the Harry Smith matter. Therefore, it cannot be said that as of 29 May the parties contemplated no further bargaining after discussion between Clary and Kleiner. We also find that the Union's failure ever to demand that the Harry Smith matter be removed from the bargaining table and its apparent willingness to let Kleiner handle the matter is further evidence that the parties had not exhausted bargaining and that the Union's position was not intractable.

Furthermore, we find, contrary to the Administrative Law Judge, that the alleged statement by Jacobus to Mosqueda on 2 June that "as far as he was concerned there was no contract unless [the Harry Smith matter] was resolved" does not establish that Respondent, in fact, was insisting to impasse on that matter. In light of Clary's statement that further negotiations would be arranged, Jacobus' 2 June statement merely was consistent with a stance of hard bargaining in the context of the then as yet unresolved status of the Smith matter pending the attempt to resolve it in the hiatus between negotiation sessions.[7]

On the basis of all of the foregoing, we find that Respondent has neither failed to execute an agreed-upon contract nor insisted to impasse on the inclusion of a nonmandatory subject of bargaining in the contract. Therefore, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting in part:

I agree with the majority that, under *Nordstrom, Inc.*, 229 NLRB 601 (1979), and *Laredo Packing Co.*, 254 NLRB 1 (1981), there was no agreed-upon contract and Respondent therefore did not violate Section 8(a)(5) of the Act by refusing the Union's request to execute the proposed collective-bargaining agreement. Contrary to my colleagues, however, I agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) of the Act by conditioning its acceptance of a contract upon the settlement of an arbitration decision's reinstatement order, a nonmandatory bargaining subject.

As credited by the Administrative Law Judge, the evidence shows tht after the Union presented its contract proposal at the parties' first bargaining session on 21 May 1981,[8] Respondent's chief negotiator, Clary, raised the Harry Smith arbitration decision and indicated that Respondent wanted to resolve the matter. The Western Michigan Industrial Board had ordered on 27 January that Smith be reinstated to his mechanic's job. Respondent, however, was reluctant to reinstate Smith and wanted Smith to waive his right to reinstatement in return for a monetary settlement. The Union's chief spokesman, Mosqueda, responded to Clary's introduction of the Smith issue by stating that he had no authority to resolve the matter, but he agreed to call Smith to determine if the latter would be willing to settle the case. Mosqueda reported Smith's interest in settling, but he also told Clary that any settlement had to be negotiated with the Union's attorney, Kleiner.[9]

The parties met again on 29 May when Respondent submitted a complete proposal to the Union and explained it item by item. In presenting the item 3 proposal to satisfactorily resolve the Smith dispute, Clary again stated that Respondent wanted

[6] *Inta-Roto, Inc.*, 252 NLRB 764, 768 (1980).

[7] We note, once again, that Clary stipulated in the ground rules to negotiations that only he would be the spokesperson for Respondent and that "any talk by . . . Jacobus was just talk." Moreover, we note that the Administrative Law Judge, without making a clear-cut credibility resolution, decided not to rely on Jacobus' earlier alleged statement as an accurate reflection of Respondent's position for purposes of making a determination on the impasse issue.

[8] All dates are in 1981.

[9] In referring Clary to attorney Kleiner, who was not involved in the contract negotiations, Mosqueda expressed concern that any attempt on his part to settle the Smith matter might subject him to a fair representation suit by Smith.

to enter into a settlement providing for Smith's waiver of reinstatement. After discussing Respondent's entire package, Mosqueda and shop steward Guild agreed to the proposal except for item 3. Mosqueda repeated the Union's position to Clary—that he did not have the authority to settle the Smith case and that Respondent should pursue the matter with Kleiner.[10] Respondent's general manager, Jacobus, responded that there would be no contract unless the Smith matter was resolved.

Shortly thereafter, the unit employees voted to accept Respondent's proposal except for item 3. When Mosqueda advised Jacobus on 2 June of the ratification vote, Jacobus again stated that there would be no contract unless the Smith case was resolved. No further contract talks took place.[11]

I agree with the Administrative Law Judge that the facts set forth above show that Respondent insisted to impasse on the Smith matter, a nonmandatory subject of bargaining, as a condition precedent to its agreement on a contract. The Union's chief negotiator plainly stated at both bargaining sessions that he did not have the authority to resolve the Smith issue and that Respondent would have to handle the matter with the Union's attorney.[12] Respondent undoubtedly understood the Union's position since Clary's notes of the negotiating sessions reflect the Union's desire that Respondent deal with Kleiner regarding the Smith matter. Therefore, as of 29 May, the Union had agreed to Respondent's entire contract proposal except for item 3, and Respondent understood the Union's position that the Smith matter would have to be handled with Kleiner. Respondent was free at that point to modify the mandatory subject portion of its proposal, but did not do so. Instead, it withheld agreement to a contract pending the Union's acceptance of the nonmandatory bargaining subject.[13]

Respondent's insistence on the Union's acceptance of a nonmandatory subject as a condition precedent to a bargaining agreement is further evidenced by Jacobus' statements linking Respondent's agreement on a contract to the resolution of the Smith matter. Contrary to my colleagues' references to "alleged" statements by Jacobus, I believe the Administrative Law Judge clearly found that Jacobus stated on two occasions that there would be no contract unless the Smith matter was settled. Despite this finding, the Administrative Law Judge chose not to consider the remark as an accurate reflection of Respondent's position. I find the statements to be highly probative of Respondent's stance in view of Jacobus' status as Respondent's general manager, Clary's silence at the time of Jacobus' 29 May statement, and the consistent nature of the statements with Respondent's conduct during the negotiations.[14]

Given these circumstances, I would find that Respondent conditioned its acceptance of a collective-bargaining agreement upon the settlement of the Harry Smith arbitration award, a nonmandatory bargaining subject, and therefore violated Section 8(a)(5) of the Act.[15] See *Laredo Packing Co., supra* at 18–19.

[10] Mosqueda reiterated his concern about a fair representation suit if he tried to resolve the Smith case.

[11] On 2 June Respondent was also informed that the employees had requested the Union's decertification. A decertification petition was filed on 5 June.

[12] Contrary to the majority, I find that Mosqueda's statements expressing his lack of authority in the Smith case and referring the matter to Kleiner effectively put Respondent on notice that the Smith matter would not be handled at the bargaining table and made any formal demand by the Union to that effect unnecessary.

[13] My colleagues rely on a statement by Clary at the conclusion of the 29 May bargaining session to show that the parties had not exhausted their bargaining efforts. Clary's testimony concerning the 29 May meeting reveals that after the Union accepted all but item 3 of Respondent's proposal, Clary advised Mosqueda that Respondent still wanted to resolve the Smith matter. According to Clary, Mosqueda agreed but stated, "You have to handle that with Mr. Kleiner." Clary indicated he would continue his efforts to contact Kleiner and that "we would then see if we could resolve the total matter, and we would get back to the Union or schedule another meeting to get the matter resolved."

I find Clary's testimony consistent with the view that Respondent insisted on a settlement of the Smith matter as a condition precedent to its agreement on a contract. The testimony reflects Respondent's constant interjection of the Smith matter and the Union's position that the issue be handled with Kleiner away from the bargaining table. Furthermore, Clary's statement alluding to future contact with the Union appears to concern the Smith matter and, in my view, fails to demonstrate that further negotiations were to be arranged. Given the fact that Respondent did not seek to modify its contract proposal following the Union's acceptance of all but item 3, the only "bargaining" that can be said to have been contemplated was by one party—Respondent—with respect to one subject—the Smith matter.

[14] The majority finds that Jacobus' 2 June statement, considered in light of Clary's statement at the end of the 29 May negotiating session, is consistent with a stance of hard bargaining and does not establish that Respondent was insisting to impasse. I find the meaning of Jacobus' statement to be clear on its face. Moreover, as discussed in fn. 13, the only bargaining contemplated by Clary involved the settlement of the Smith matter. Viewed in that light, Jacobus' statement reflects Respondent's position of linking a contract to the settlement of the Smith case.

[15] Since I would find an unfair labor practice in this context, I would reject Respondent's assertion of a good-faith doubt as to the Union's continued majority status.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge: This case was heard on June 18, 1982, in Grand Rapids, Michigan. The charges were filed by General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, on June 5, 1981, and the complaint issued on July 23, 1981. It charged Respondent Good GMC, Inc., with violating Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) for refusing to execute a written contract embodying the agreement with respect to terms and conditions of employment, demanding as a condition to the bargaining agreement that the Union withdraw a grievance involving Harry Smith, a former employee.

Respondent filed a timely answer in which it admitted the jurisdictional allegations in the complaint. The answer denied any allegation that the Company violated Act.

Upon the entire record including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

Respondent Good GMC, Inc., a Michigan corporation, is located at 4800 Clyde Park, S.W., in Wyoming, Michigan. It is engaged in the retail sale and servicing of General Motors Corporation trucks. It is admittedly an employer within the meaning of Section 2(6) and (7) of the Act.

The Union, General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

Respondent's predecessor, Kroblen GMC Truck Sales, Inc., and the Union were parties to a collective-bargaining agreement, effective June 1, 1978, through May 31, 1981, which covered the approximately 11 service department mechanics. On March 1, 1981, Good GMC, Inc., acquired the assets of Kroblen and continued the operation without substantial changes. Good GMC also continued to honor the terms of the bargaining agreement.

Since the agreement was about to expire in May, the Union notified the Company approximately 60 days prior to the expiration date of May 31, 1981, that it wished to negotiate a new contract. Benjamin Mosqueda, the Union's business agent, also informed Peter Jacobus, Respondent's general manager, sometime in May 1981, that the Union was ready to meet with the Company on a new agreement.

On May 21, the parties met for their first bargaining session. The Company was represented by attorney Jack Clary and General Manager Peter Jacobus, the former acting as chief spokesman. The Union, represented by Benjamin Mosqueda and employee Larry Guild, had a completed proposal ready for presentation to the Company. But the parties first discussed the company's intentions with respect to its profit-sharing plan. When the Company agreed that it would continue the same plan, the Union outlined its proposed package for a new agreement. It included a wage increase for the first year, a wage reopener for the second and third year, one additional holiday, and an increase in the health and accident insurance. The Company expressed its intention to respond to the Union's proposal at a subsequent meeting and emphasized that it wanted the "Harry Smith matter" resolved.

Harry Smith had been a mechanic employed by Kroblen. He had also been a union steward when he was discharged in December 1980. A grievance challenging his discharge was taken to arbitration and ultimately before the Western Michigan Industrial Board. The decision of the Industrial Board, dated December 16, 1980, ordered that Smith be reinstated. He was reemployed by Kroblen. His subsequent discharge became the subject of yet another grievance which was eventually taken before the Western Michigan Industrial Board. By order of January 27, 1981, the Board ordered the reinstatement of Smith with backpay. Respondent, however, was reluctant to reinstate Smith as ordered by the Industrial Board and, instead, wanted to settle the matter by the payment of a sum of money.

When during the bargaining session on May 21, Respondent's chief negotiator Clary stated that he was interested in resolving the Smith matter, Mosqueda responded that he had no authority to enter into a settlement. But he agreed to talk to Smith. In the presence of Clary Mosqueda called Smith to ask whether he would be willing to settle his case. Smith apparently indicated that he wanted about $40,000 in settlement of his case. Mosqueda so informed Clary, and also told him that any settlement had to be negotiated with Robert Kleiner, the attorney for Teamsters Local 406, because any attempt on his (Mosqueda's) part might subject him to a fair representation suit by Smith.

On May 29, the same parties met for their second negotiation session. The Company handed a complete proposal to the Union. Clary explained it item-by-item (G.C. Exh. 5). Item 3 stated: "Satisfactory resolution of the Harry Smith dispute." Clary reminded the union representative that the Company wanted to settle the Smith dispute and offer a dollar figure in exchange for Smith's waiver of reinstatement. The two union members discussed the entire proposal briefly and informed the company representatives that all items were acceptable except for item 3. Mosqueda emphasized again that he did not have the power to withdraw the grievance and settle the Smith dispute, and that the Company should contact attorney Kleiner concerning that matter. Mosqueda repeated his apprehension about a fair representation suit if he attempted to a settlement.[1] Although Clary attempted to call Kleiner on several occasions, the two men never got together to settle the Smith dispute.

Following the bargaining session, Mosqueda assembled the unit employees, explained the Company's offer to them and recommended that they accept it in its entirety except for item 3, the Smith matter. The employees promptly voted to accept the Company's proposal with the exception of item 3.

On June 2, 1981, Mosqueda called Good GMC and informed Jacobus that the employees had voted to accept the Company's proposal but not item 3. Jacobus however, replied, that there would be no contract unless the Smith matter was resolved. On the same day, the Company was finally informed that the employees no longer wanted the Union to represent them. A decertification petition was filed on June 5.

[1] In his testimony, Mosqueda recalled that Jacobus made a statement to the effect that there would be no contract unless the Smith matter was resolved. Clary could not remember whether that statement was made and Jacobus unconvincingly denied that he said that. The General Counsel would attach a great deal of significance to that statement even though it is clear that Clary was the chief negotiator on behalf of Respondent. In any case, Respondent's conduct is more accurately reflected by an appraisal of all surrounding circumstances. I have therefore decided not to consider that statement as an accurate reflection of the Company's position.

The General Counsel argues that the record supports a finding that Respondent violated Section 8(a)(5) and (1) of the Act when it refused to execute a written agreement demanding as a condition precedent to its acceptance of any bargaining agreement that the Smith matter, a nonmandatory subject of bargaining, be resolved. Respondent maintains that the Union declined to agree to part of the package proposal thus rejecting the Company's entire proposal, and that item 3, although a nonmandatory subject of bargaining, was properly a part of the entire package proposed by the Company. According to Respondent, it did not insist to the point of impasse on the resolution of the Smith matter.

Section 8(a)(5) of the Act makes it unlawful for an employer "to refuse to bargain collectively with representatives of his employees . . . ." And Section 8(d) of the Act provides that the parties' obligation is "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." The duty to bargain in good faith, as provided above, is limited to those areas considered mandatory subjects of bargaining. "But that good faith does not license the employer to refuse to enter into agreement on the ground that they do not include some proposal which is not a mandatory subject of bargianing." *NLRB v. Borg-Warner Corp.*, 365 U.S. 342, 349 (1958). Here, there is no serious question[2] that the "Smith matter" was a nonmandatory subject of bargaining. The question remains whether the Employer insisted to the point of impasse upon the resolution of the Smith dispute as a condition to the agreement.

Consideration of all surrounding circumstances indicates that Respondent in effect insisted that the Union enter into a settlement in the Smith matter and withdraw the grievance before it would sign the contract. When the Union made its first proposal, Respondent interjected the Smith matter. The Union, while attempting to cooperate and ascertain whether a settlement was possible, made it clear from the outset that it had no authority to settle the matter and that, indeed, it was apprehensive about a fair represenation suit if it attempted to do so. Accordingly, insofar as the Union was concerned, the Smith dispute was not even a legitimate area of bargaining. And the record shows, contrary to Respondent's assertion, that the Union had not attempted to bargain over that issue. Mosqueda consistently advised Clary that he should deal with attorney Kleiner and not with anyone on the negotiation team. The Union took the same position at the second negotiation session. At that meeting, the Union adopted all items of the Company's proposal except for item 3, the Smith matter. While the Company attempted to incorporate that issue into its written package proposal, the record is clear that nowhere in the discussions did that issue become an integral part of the agreement. To be sure, Respondent stated that it wanted to start with a clean slate, the record is also clear that the Union did not regard it as a negotiable item. Significantly, since the Western Michigan Industrial Board had issued a decision in the Smith matter, the dispute had been resolved and was indeed no longer negotiable. The fact that the Company made an offer which the Union accepted in its entirety, with the exception of the Smith matter, shows that there was a meeting of the minds with respect to all subjects in the contract with the exception of item 3. And the Company's refusal to sign the contract after the Union had accepted the Company's proposal without change shows that Respondent had made item 3, a nonmandatory subject, a condition precedent to its acceptance of the agreement. For these reasons, the Respondent violated Section 8(a)(5) and (1) of the Act.[3]

CONCLUSIONS OF LAW

1. Respondent Good GMC, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, General Teamsters Union, Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has assumed the collective-bargaining relationship with the Union as the bargaining representative of all service department employees employed by Kroblen GMC Truck Sales, Inc., located at 4800 Clyde Park Avenue, S.W., Wyoming, Michigan, including leadman; but excluding clerical employees, guards and supervisors as defined in the Act, as constituting a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

4. By failing and refusing to execute a written contract embodying the agreement reached on May 29, 1981, demanding as a condition to consumating any collective-bargaining agreement that the Union resolve the Smith matter and withdraw a grievance and thereby waive the arbitration award favorable to Harry Smith, Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that Respondent has engaged in the unfair labor practices found above, I shall recommend that it cease and desist therefrom and that it take affirmative action designed to effectuate the purpose of the Act.

[Recommended Order omitted from publication.]

[2] Respondent suggests that a serious question remains whether it is the "successor employer" of Kroblen and that the Smith dispute might therefore be considered a mandatory subject of bargaining. To the contrary, lack of successorship would remove the issue only further.

[3] Respondent's reliance upon *Nordstrom, Inc.*, 229 NLRB 601 (1977), and some aspects in *Laredo Packing Co.*, 254 NLRB 1, 18 (1981), is misplaced. Those cases did not deal with nonmandatory subjects of bargaining which had been finally resolved by arbitration and which might expose the Union to fair representation suits if it were to bargain over them.